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In the Supreme Court of the United States

OCTOBER TERM, 1973

73-124

No. 73-

JACK ALKIRE, ET AL.,
Petitioners,

vs.

DR. JOHN W. CASHMAN, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the above case on April 17, 1973.

OPINIONS BELOW

The opinions of the District Court for the Southern District of Ohio (Ap. A1), and the Court of Appeals for the Sixth Circuit (Ap. A10) are not as yet reported.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on April 17, 1973 and a copy thereof is appended to this petition in the Appendix at Ap. A10. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

The Ohio legislature enacted a statute mandating fluoridating of municipal water systems of a certain size, unless the "political subdivisions" served voted against fluoridation by public referendum. As a consequence, the City of Columbus enacted an ordinance providing for such fluoridation.

The following questions are presented:

1. Does compulsory fluoridation of a municipal water system violate Petitioners' constitutionally guaranteed right to be free from arbitrary intrusions into their individual privacy?

2. Is a statute constitutionally unreasonable if it provides for a public vote in terms which make it impossible for a citizen to exercise such a right?

3. Does compulsory fluoridation of a portion only of the state water systems deny Petitioners equal protection of the laws?

FEDERAL, STATE, AND MUNICIPAL STATUTES APPLICABLE

The applicable federal law to this petition is AMENDMENT 14 of the United States Constitution providing:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Ohio statute relevant here is Ohio Revised Code Section 6111.13, providing in pertinent part:

> *"If the natural flouride content of supplied water of a public water supply and water-works system is less than eight-tenths milligrams per liter of water, flouride shall be added to such water to maintain a flouride content of not less than eight-tenths milligrams per liter of water nor more than one and three-tenths milligrams per liter of water beginning:*
>
> *(A) On or before January 1, 1971, for a public water supply and water-works system supplying water to twenty thousand or more persons;*
>
> *(B) On or before January 1, 1972, for a public water supply and water-works system supplying water to five thousand or more persons, but less than twenty thousand persons. A municipal corporation may request the department of health for reimburse-*

ment of the actual cost of acquiring and installing equipment, excluding chemicals added to the water supply, necessary for compliance with division (A) or (B) of this section. The director of health, upon determination of the necessity of this cost for this purpose, shall order the reimbursement of the municipal corporation for such costs, from funds available to the department.

Within one hundred twenty days after the effective date of this section a petition may be filed with the board of elections of a county containing a political subdivision served by a public water supply to which flouride must be added under this section and where flouride was not regularly added to such water supply prior to the filing of such petition, requesting that the issue of adding flouride to this water supply be placed on the ballot at a special election in the political subdivisions of the county or adjoining counties served by the water supply, to be held on a date specified in the petition not less than ninety nor more than one hundred twenty days after the date of filing the petition.

The petition shall meet the requirements of section 3501.38 of the Revised Code and, in addition, shall designate the political subdivisions in the county and adjoining counties served by the water supply and shall be signed by not less than ten per cent of the number of electors served by the water supply of each political subdivision who voted for governor at the last preceding gubernatorial election. The board of elections shall place the issue on the ballot at the special election to be held in the political subdivision served by the water supply.

If a water supply extends into more than one county, the board of elections of the county where the petitions are filed shall, within ten days after such filing, send notice of such filing to all other boards of elections of counties served by the water supply and shall furnish all ballots for the special election.

In political subdivisions where only a part of the electors are served by the water supply, only those electors shall be allowed to vote on the issue who sign forms provided by the board of elections stating that they are served by the water supply. The question of adding flouride to the water supply shall be determined, at this election, by a majority vote of those voting on the issue."

The Columbus Municipal Ordinances relevant here are 1739-71 and 1162-72 providing:

WHEREAS, it is necessary for the protection of the public health, peace and safety to maintain a certain fluoride content in the water supplied by the water-works system of the City of Columbus, Ohio; now, therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF COLUMBUS:

Section 1. That the Director of Public Service be and is hereby authorized and directed to advertise for bids for the purchase of the necessary equipment and chemicals to maintain a fluoride content in the water supplied by the water-works system of the City of Columbus, Ohio, of not less than eight-tenths milligrams per liter of water nor more than one and three-tenths milligrams per liter of water.

Section 2. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

WHEREAS, the State of Ohio has given its approval for plans for the Division of Water to Fluoridate the city water, and

WHEREAS, an emergency exists in the usual daily operation in the Division of Water, Department of Public Service, in that it is immediately necessary to acquire this Fluoridation Equipment which will be needed to initiate the water fluoridation process, for the immediate preservation of public health, peace, property and safety.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF COLUMBUS:

Section 1. That the Board of Purchase be and it is hereby authorized and directed to enter into a contract for Fluoridation Equipment for the Division of Water, Department of Public Service.

Section 2. That the sum of $35,000.00 or as much as may be needed be and the same is hereby appropriated from Water Works Dep. & Imp. Fund No. 6900, Dept. 900, Code 600 to pay the cost thereof.

Section 3. That for reasons stated in the preamble hereto, which is made a part hereof, this ordinance is declared to be an emergency measure and shall take effect and be in force from and after its passage and approval by the Mayor.

STATEMENT OF THE CASE

The Petitioners brought this action to prevent compulsory fluoridation of the public water supplies, on the grounds that such action is a violation of Petitioners' constitutionally protected rights. Petitioners requested a three-judge court be convened pursuant to 28 U.S.C.A., Section 2281, for the purpose of 1) declaring *Ohio Revised Code* Section 6111.13 mandating fluoridation unconstitutional 2) enjoining the Ohio Department of Health from enforcing the above-named *Ohio Revised Code* section, and 3) enjoining the Mayor and Director of Public Service of Columbus from implementing fluoridation plans adopted pursuant to the statute.

Without directly ruling on the request for a three-judge court, on September 29, 1972, the District Court heard Plaintiffs' motion for a temporary restraining order and Defendants' motion to dismiss. Solely on the pleadings of the case, the District Court denied injunctive relief and granted Defendants' motion to dismiss on the grounds that the case did not present a substantial federal question.

On April 17, 1973, the Court of Appeals for the Sixth Circuit affirmed the finding of the lower court.

REASONS FOR GRANTING A WRIT

1. Water is essential to human life. When the need for water is supplied by a public water system, the reach of that system is all pervasive. Only a hermit with means to distill or buy unfluoridated water and the willingness to avoid prepared food and drink can escape it. As unacceptable as this avenue of escape is, by definition it is open only to a miniscule part of the population. The statute in question, therefore, in effect mandates individual ingestion of governmentally administered fluorides.

The administration of fluorides is justified on the ground that it reduces the incidence of dental caries, particularly among the young. Caries is the result of diet and poor tooth care; it is not contagious or communicable; caries in the teeth of one person do not endanger the teeth of another; and prevention of caries in the teeth of one person does not reduce the incidence of caries in the teeth of anyone else.

The fluorides thus administered to the individual by government edict constitute compulsory medication, an invasion of privacy which in principle is as extreme an intrusion as government in this country has yet attempted.

This Court has recognized the existence of constitutionally guaranteed areas of privacy. *Roe* v. *Wade*, ... U.S....., 35 L. Ed. 2d 147 (1973). It has never considered whether the scope of this guarantee includes freedom from compulsory medication for the benefit solely of the individuals on whom such medication is forced. In view of the increasing development and use of drugs capable of inducing psychological, physiological and genetic changes in their users, and the increasing power of government

over the daily lives of an ever increasing proportion of the population, the question here presented cries out for consideration.

If John Doe can be forcibly fluoridated because the legislature in its wisdom decides his teeth will thereby be improved, why cannot his contrary disposition be pacified, his desire to indulge in smoking eliminated, and his tendency to overpopulate the country be curbed by administration through the water supply of whichever of the current wonder drugs the legislative wisdom determines is best suited to each objective? Assuming legislative infallibility, where do the foregoing proposals differ in principle from the statute which is now imposed upon us?

If for concern only for each individual and not for society as an interacting mass, we can be forced to ingest an unwanted chemical by its application at the source, why cannot we be denied the right to eat certain things by eliminating them at the source? Making illegal the sale of candy, pop, pastries and potato chips would do more to eliminate dental caries and promote the general physical welfare than even the most optimistic claims for general consumption of fluoride. Aside from the fact that this would be unpopular, would such repression not also be unconstitutional?

The gravity of this issue appears obvious to us. The necessity for a consideration of the issue is no less urgent because the two courts below have with what seems to be a simple shake of the head found that no constitutional issue exists. Notwithstanding the "two court rule," this Court should not put this grave issue to rest on the basis of two opinions which deny that it exists.

The fluoridation issue itself was the subject of substantial public debate which, because of the way the pro-

ponents stated the issue, centered on the physiological merits of the proposal. The issue we present here is one of constitutional principle, and we wish to avoid any diversion into medicine, physiology or bio-chemistry. However, because the proponents of compulsory mass fluoridation have obscured the philosophical issue behind their extravagant claims to promotion of the undiluted general welfare, it is not inappropriate to point out that no lobbyist and no legislature has yet developed omniscience. The doctors whose prescriptions of thalidomide to pregnant women caused tens of thousands of defective births were simply wrong, not wrong minded. Many of their wives were among the unfortunates. How much better judges of pharmacopoeia and bio-chemistry are our legislators than are our medical doctors?

In areas of strictly individual good, a necessary element of a free society is that we are free to accept or reject benefits. But if we had a guarantee of governmental infallibility, beneficial intrusions into privacy might be of lesser constitutional concern than in a world where government is at least as fallible as the governed. In a complex world where we do not know what the morrow will bring concerning DDT, cyclamates, monosodium glutamate, etc., and we only know that what we thought we knew about them yesterday is wrong—in such a world, the right of the individual to make his own mistakes about the things that concern only him is paramount to continued existence of a society even relatively free.

2. A statute which provides for a grant of a substantive right but denying effective use of such a right by restrictive procedural requirements is wholly unreasonable. The right to exempt oneself from mandatory fluoridation is created by specifying that a municipality could

have a referendum and vote against fluoridation. However, in order to have such an election, a petition must be filed with the Board of Elections of the county in which the water supply system operates and the petition must contain the signatures of at least 10% of the number of electors *served by the water supply of each political subdivision.* Since neither the officials of the municipalities nor the potential petitioner knows or can reasonably ascertain exactly which electors of what political subdivisions are served, the requirements of ORC 6111.13 make compliance impossible.

The City of Columbus, Ohio, lists the political subdivisions served by its Division of Water as follows:

Bexley
Arlington
Grandview
Franklin County Sewer District No. 4
Gahanna
Worthington
Riverlea
Grove City
Whitehall
Village of Marblecliff
Franklin County
Valleyview
Minerva Park

It is general knowledge that the whole of Franklin County is not served by the Columbus water system, and it is equally obvious that the users of Columbus water who live outside of the municipalities and villages named above live in many different, and undoubtedly overlapping political subdivisions.

The problem of ascertaining which "political subdivisions" are served by the water system is insurmountable.

According to an opinion of the Attorney General of Ohio 72-035, "(T)here is no general statutory definition of a political subdivision, although there are definitions for specific purposes."

The term political subdivision has been used to designate a variety of governmental units and has been held to mean "any county, municipal corporation, township, township fire district, township waste disposal district, or school district, except the county school district." *Sharon Realty* v. *Westlake*, 114 Ohio App. 421 (1961).

In other circumstances, the term has been limited to mean county, township, city, village, or school district. ORC 3501.01, 5915.01. In the Attorney General's opinion of 1972, the term political subdivision is expansively defined to mean "a limited geographical area wherein a public agency is authorized to exercise some governmental function."

The term political subdivision then includes both school districts and sewer districts that often overlap village and township boundary lines.

In attempting to clothe Section 6111.13 with an aura of constitutionality the Legislature added to the original S.B. No. 137 provisions that the electors who sign the petition must be "*served by the water supply*" and that 10% of the electors so served in each "political subdivision" must sign petitions to place the issue of fluoridation on the ballot.

The combination of such requirements creates a practical barrier that is impossible for petitioner to hurdle.

A person circulating a petition under Section 6111.13 will be faced with the problem of what to do with the water users who live in the overlapping area. Would it be necessary to have such users sign two (2) petitions, one for the appropriate township and one for the appropriate sewer or school district?

Once the matter of locating the "political subdivisions" is decided, if such decision could be possible, the petitioner is then faced with the task of verifying the identity of the water users therein. Since the water systems officials will only be able to supply billing information, the petitioner faces an impossible task in ascertaining which electors are users.

Therefore, the Legislature has chosen an arbitrary means for implementing the statute which has no reasonable relation to its legislative goal. Indeed the statute seems deliberately to have been drafted so as to give the appearance of submitting to the democratic process without actually doing so.

Section 6111.13 represents an arbitrary and capricious exercise of legislative power and should be stricken down.

Prior to enactment of the Ohio Revised Code, residents of the City of Columbus in public referenda twice voted down fluoridation of the water supply. By prescribing procedure for what is described as a referendum but which is in fact an impossibility, the statute in question effectively denies citizens of Columbus (and elsewhere) the right to vote on this issue. It is constitutionally offensive to be denied the right to vote; it is doubly offensive when the denial is cloaked in terms of a grant, and is used to circumvent the expressed will of the voters.

3. The compulsory fluoridation of the water system of municipalities of 5,000 and over and the exemption of smaller communities from the requirement of fluoridation as a violation of petitioner's right to equal protection of the laws. In the case of a personal right, the state must show a compelling reason for the distinction drawn between those in the status of petitioners and those whose status qualifies them for the exemption from fluoridation. In the absence of any overriding consideration of general welfare, and as there is none when the benefit is to the individual rather than the community as a whole, no compelling reason for such a distinction can be shown. There is no justification for infringing upon the personal freedom of those who are living in a large community and permitting those who by chance live in a small community to retain their freedom to refuse to fluoridate; there is no rational reason for infringement of right to be based upon the circumstance of residence.

The questions raised before this Court are of importance and should be given a thorough examination by the federal courts. To summarily dismiss petitioners' claims without a full hearing would encroach upon the dignity of the individual and would be inconsistent with this Court's philosophy of individual rights.

CONCLUSION

For the reasons set forth above, it is respectfully submitted in this petition that a writ of certiorari should be granted.

Respectfully submitted,

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§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

OPINION AND ORDER

This matter is before the Court on plaintiffs' application for a temporary restraining order and on defendants' motion to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. See Rules 65(b) and 12(b) (1) (6), Fed. R. Civ. P.

In their complaint herein, in which jurisdiction is predicated upon 28 U.S.C. §1331, the plaintiffs' have challenged the constitutionality of Section 6111.13 O.R.C. (hereinafter the Act) and have requested the convening of a three-

judge court, pursuant to 28 U.S.C. §§2281 *et seq.* for the purpose of declaring that provision void. The statute in question requires that all public waterworks systems in Ohio serving more than 20,000 persons, fluoridate their water supplies to a specified range of fluoride content, by January 1, 1971; and that systems serving between 5,000 - 20,000 persons perform this duty by January 1, 1972. Systems serving fewer than 5,000 persons are not required to fluoridate their water under the Act. The Columbus Municipal Waterworks (hereinafter the City) supplies more than 20,000 persons, including persons living in incorporated communities beyond the corporate limits of the city. It appears that the city has not yet complied with the state statute but intends to fluoridate its water supplies by November, 1972, pursuant to authorization conferred upon it by Columbus City Ordinances Nos. 1739-71 and 1162-72 (hereinafter the Ordinances).

Some confusion is present in the pleadings as to the city's motivation in fluoridating its water supplies. The plaintiffs assert that the municipal ordinances referred to above will merely implement the requirements imposed upon the city by the Act. They argue from this premise that what is really at issue at bar is a statute of statewide application which mandates fluoridation of municipal water systems and that this statute contains certain alleged constitutional infirmities. These statutory infirmities include alleged violations of plaintiffs' rights of privacy, due process and equal protection as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States; and of the rights of their respective communities to home rule, as provided for in Article XVIII, Section 7, of the Ohio Constitution. Plaintiffs further argue that the enactment of Section 6111.13 impaired the contractual obligations owing from the city to certain sur-

rounding communities in Franklin County, Ohio, in violation of Article I, Section 10, of the United States Constitution.

The defendants dispute plaintiffs' contentions that the city adopted the ordinances by way of implementing the Act. They note, in support of this position, that the city is out of time under the deadlines imposed by the statute; that the State has taken no steps to force compliance by the city; and further that the ordinances make no reference to the duties, if any, that are imposed by the state. Under this theory, the city argues that it has the right under federal and state law, and under the doctrine of home rule, to fluoridate its water supplies. The Court will consider the disparate contentions of this matter alternatively under both the plaintiffs' and defendants' theories of the case, beginning with the latter.

If we assume that the ordinances were adopted pursuant to the general police powers of cities incorporated under the laws of Ohio, and in conformity with rules governing their respective political processes, then it is settled in this state that the fluoridation of a municipal water supply is a proper exercise of municipal police powers which does not violate either federal or state constitutional rights. See *Kraus* v. *City of Cleveland*, 163 O.S. 559, 57 O.O. 1 (1955), *appeal dismissed for want of a substantial federal question*, 351 U.S. 935 (1956).

If, on the other hand, we were to accept plaintiffs' theory of the case, we are still of the opinion that the petition fails to raise a justifiable issue. Courts, both state and federal, have held with virtual unanimity that the fluoridation of public water systems does not violate the due process clause or constitutional rights incorporated by that clause of the Fourteenth Amendment to the United States Constitution. See *Kraus* v. *City of Cleve-*

land, supra, *appeal dismissed for want of a substantial federal question*, 351 U.S. 935 (1956); *Crawford* v. *City of Detroit*, 389 F. 2d 1001 (C.A. 6 1968); *Chapman* v. *City of Shreveport*, 225 La. 859, 74 So. 2d 142 (1956), *appeal dismissed for want of a substantial federal question*, 348 U.S. 892 (1954); *Ready* v. *St. Louis County Water Co.*, 352 S.W. 2d 622 (Mo. 1961), *appeal dismissed and cert. denied*, 371 U.S. 8 (1962); *Dowell* v. *City of Tulsa*, 273 P. 2d 859 (Okl. 1954), *cert. denied*, 348 U.S. 912 (1955); also see, Opinion of Justices, 243 A. 2d 716 (Del. 1968); *Scharinger* v. *Chicago*, 198 N.E. 2d 326 (Ill. 1966); *Miller* v. *Evansville*, 219 N.E. 2d 900 (Ind. 1966); *Baer* v. *Bend*, 292 P. 2d 134 (Ore. 1956); *Birnel* v. *Fircrest*, 335 P. 2d 819 (Wash. 1959). In addition, the Supreme Court of Ohio has held, with specific reference to Section 6111.13, that the writ of prohibition will not lie against the mayor of a city who acts to fluoridate a municipal water supply pursuant to the command of that statute. See *State ex rel. Lehmann* v. *Cmich*, 23 O.S. 2d 11, 52 O.O. 2d 32, 260 N.E. 2d 835 (1970).

Plaintiffs present two additional questions which, to our knowledge, have not been raised in their precise terms in other actions similar to the present suit. Plaintiffs' first contention, that the act violates the Equal Protection Clause of the Fourteenth Amendment, requires little discussion. As noted earlier, Ohio with reference to the act in question, has chosen to classify differently public water systems serving fewer than five thousand persons from those serving more than that number of users. Plaintiffs contend that this legislation distinguishes unfairly between large and small water suppliers, is violative of Article II, Section 26, of the Ohio Constitution which requires that state laws of a general nature have a "uniform operation throughout the state", and further violates the federal Equal Protection Clause.

Considering first plaintiffs' state law contention, the Court notes that Article XVIII, Section 1, of the Ohio Constitution specifically classifies municipal corporations into villages, having fewer than 5,000 persons, and cities having 5,000 or more inhabitants. The statutory classification in this case is in conformity with and analogous to this constitutional provision, and in our view does not result in a non-uniform effect within the meaning of Ohio law. See *Bucyrus* v. *Dept. of Health*, 120 O.S. 426 (1929); *State ex rel. Raney* v. *Davis*, 119 O.S. 596 (1929); *State ex rel. Heffernan* v. *Serp*, 125 O.S. 87 (1932).

Nor do we think that a substantial question is raised under the Equal Protection Clause to the Fourteenth Amendment. The Equal Protection Clause does not prohibit a state from drawing distinctions between groups and legislating differently for the various groups so designated. See *Schapiro* v. *Thompson*, 394 U.S. 618 (1969); *Rinaldi* v. *Yeager*, 382 U.S. 305 (1966); *Williams* v. *San Francisco Unified School District*, No. 72-305 (N.D. Calif.), ... F. Supp. ..... (1972). However, "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 421, 415 (1920); *Reed* v. *Reed*, 404 U.S. 71 (1971); *Heath* v. *Westerville Board of Education*, No. 71-379, 345 F. Supp. 501 (S.D. Ohio E.D. June 28, 1972).

In light of the provision of the Ohio Constitution cited above, which differentiates, as a matter of state constitutional law between villages and cities, and on its face, we do not believe that the act creates arbitrary classifications within the meaning of the Equal Protection Clause. The Ohio General Assembly, at least arguably, created this classification so as to reach an optimum number of

citizens, at the least possible cost, utilizing the greatest efficiencies of scale. The fact that the legislature chose, at this time, not to include within the reach of the act public water systems serving less than 5,000 users does not invalidate the act as a whole. There is no federal constitutional requirement that a state exercise its police powers, to the fullest extent, at any given time, nor that a state law, from the point of view of equal protection necessity, has a uniform application. Because the statutory classification is parallel to the state constitutional provision and does not affect "preferred" constitutional guarantees, we do not think the State need justify the enactment under the heavier burden of "compelling state interest." See *Schapiro* v. *Thompson, supra.* For these reasons plaintiffs' foregoing contentions under the Equal Protection Clause are without merit.

Finally, plaintiffs argue that the act in question infringes on the contractual rights of their respective communities, under the Obligation of Contracts Clause of the Federal Constitution. See Article I, Section 10, supra. This argument maintains first that the City of Columbus has a monopoly on the available water resources in regional water basins, and second, that at the time these Franklin County municipalities entered water supply contracts with the City of Columbus, its water did not contain a fluoride content. Plaintiffs therefore allege that the act, to the extent that it alters the second of these conditions without modifying their rights due to the first, violates their Article I, Section 10, rights.

We have several problems with this argument. As a threshold matter, the Court entertains substantial doubt as to whether the plaintiffs in this action have standing to raise this contention. While it is true as a general matter that the formal requirements of standing have been sub-

stantially relaxed as to *federal* taxpayers, see and compare *Flast* v. *Cohen*, 392 U.S. 83 (1968) with *Frothingham* v. *Mellon*, 262 U.S. 447 (1923); but see also *Sierra Club* v. *Morton*, ... U.S. ..... (April 19, 1972), we are not at all persuaded that such relaxation inures to the benefit of plaintiffs. First, plaintiffs did not make nor were they direct parties to the contracts in question; rather, the various municipalities in which these plaintiffs live were parties to the contracts which are alleged to be infringed. Since this issue is one arising under contract, plaintiffs' relation to such contracts must be decided according to governing principles of Ohio law. See *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Under Ohio law, plaintiffs stand, at best, as third party beneficiaries to the contracts between Columbus and their respective municipalities. But according to the law of the state, only creditor and donee beneficiaries can directly assert rights based upon a contract between two other parties. In the Court's view, plaintiffs at bar more resemble incidental beneficiaries under the contract in question than they do donee beneficiaries; compare *Blunk* v. *Dennison Water Supply Co.*, 71 O.S. 250, 73 N.E. 210 (1905) with *Visintine & Co.* v. *New York C. & St. L. R. Co.*, 169 O.S. 505, 9 O.Ops 2d 4 (1959), and accordingly cannot assert a private cause of action based upon a contract between two public agencies.

But even assuming *arguendo* that plaintiffs have standing to raise this claim, it is the Court's belief that political checks, contained within the act itself, were available to prevent impairment of contract, had plaintiffs asserted their rights in a timely fashion.

Under the express terms of the statute, any citizen of those communities served by a public water system affected by the act, could have filed, within one hundred twenty (120) days of the effective date of the act, a refer-

endum petition pursuant to Section 3501.38 O.R.C. Had such a petition obtained the requisite number of signatures, as required under Ohio law, the issue of whether that public water system would have to fluoridate its water would have been determined by a majority referendum vote. Under the statute a community which found fluoridation undesirable, and which filed a petition within one hundred twenty days of the effective date of the act, could have removed itself from the ambit of the act's coverage. This political check was not employed by plaintiffs and members of their class, or by their respective communities.

Ordinarily constitutional rights are not subject to popular vote. The Ohio General Assembly could not, for example, delegate to the citizens of this state the option of abrogating, by binding referendum vote, the established First Amendment rights of an unpopular minority. See *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Lucas* v. *Forty-Fourth General Assembly*, 377 U.S. 713 (1964); *Baker* v. *Carr*, 369 U.S. 186 (1962). However, here, where as we have noted earlier, no established federal constitutional rights are at issue, the General Assembly acted well within its constitutionally permissible scope in referring this surprisingly controversial issue to the political processes and by granting local communities an option of deciding fluoridation by referendum. Plaintiffs, having been granted the opportunity to avoid the impact of the statute, and having failed to avail themselves of that opportunity, cannot now be heard to argue that the act infringes upon their contractual rights. Where no clear threat to constitutional rights is presented, courts should be reluctant to reverse the wishes of the people or their representatives, especially when effective political checks exist to gauge the popular will. See *Reitman* v. *Mulkey*, *supra*, 387 U.S. at 395-396 (Harlan, J., *dissenting*); *Lucas* v. *Forty-Fourth*

General Assembly, supra, 387 U.S. at 748-751, 754-759 (Stewart, J., *dissenting*).

We note, merely in passing, that contracts must be interpreted in light of evolving conceptions of public policy. A private contract for the sale of slaves, entered into several days before the adoption of the Thirteenth Amendment, or one for the delivery of alcoholic spirits, signed just before the ratification of the Eighteenth Amendment, would be interpreted as nullities in reference to subsequently decided but nonetheless overarching public policy goals. In situations similar to the hypotheticals posed above, courts have not perceived any violation of the obligation of contracts clause of the Constitution. See *City of El Paso* v. *Simmons,* 379 U.S. 497, 506-510 (1964); *Home Building and Loan Association* v. *Blaisdell,* 290 U.S. 398 (1933); *Stevenson* v. *Binford,* 287 U.S. 251 (1932); *Ogden* v. *Saunders,* 12 Wheat. 213, 291 (1827).

We further note that no allegation has been made that the city herein specifically contracted *not* to inject fluoride to the other chemical substances which are now added, quite routinely, to the city's water supplies. In the absence of such a contractual provision, and for all of the other reasons stated above, we HOLD that plaintiffs' contractual rights, to the extent that plaintiffs have rights under these contracts, were not infringed by the act.

Accordingly, we hold that no substantial federal constitutional question is presented and the convocation of a three-judge court is not mandated. See *In re Poresky,* 290 U.S. 30 (1933); *California Water Service Co.* v. *City of Redding,* 304 U.S. 252 (1938); *Board of Regents of the University of Texas* v. *New Left Education Project,* 404 U.S. 541 (1972). We further hold that temporary injunctive relief is inappropriate and that the Court is without subject matter jurisdiction over the action.

The views expressed in this Opinion shall supercede our oral opinion, rendered from the bench on September 29, 1972, granting defendants' motions to dismiss. In conformity with the written Order filed by the Court on October 5, 1972, and for the reasons set forth above, this action is hereby DISMISSED.

It is so ORDERED.

/s/ Carl B. Rubin
United States District Judge

ORDER

(Filed April 17, 1973)

Before: WEICK, MILLER and KENT, Circuit Judges.

This matter came on to be considered by a panel appointed pursuant to Rule 3(e) of this Court.

The appellant appeals from the dismissal of his complaint for failure to present a substantial federal question. The complaint challenges the constitutionality of Ohio Revised Code Section 6111.13 and seeks to enjoin the enforcement of that statute and the ordinances of the City of Columbus, Ohio authorizing fluoridation of the water supply of the City of Columbus. The appellants claim that the statute and the ordinances requiring and providing for fluoridation of the water constitute an invasion of individual right to privacy; and unconstitutional discrimination between communities of 5,000 persons or less and larger communities, and a violation of the contract rights of the appellants because the City of Columbus sells water to other communities.

After full consideration of the briefs and the record, the Court is satisfied that there was no error in the court below. Therefore, it is ordered that the judgment of the District Court be and it hereby is affirmed for the reasons set forth in the Memorandum Opinion of District Judge Carl Rubin.

ENTERED BY ORDER OF THE COURT

/s/ James A. Higgins
Clerk

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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-124

JACK ALKIRE, ET AL.,
Petitioners,

vs.

DR. JOHN W. CASHMAN, ET AL.,
Respondents.

RESPONDENTS, MOODY AND JACKSON, BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The Opinion and Order of the District Court and the Sixth Circuit Court of Appeals are set forth in the Appendix of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Petitioners claim in their Questions Presented that fluoridation of the City of Columbus water system (hereinafter referred to as the "City System") was effected as a result of *Ohio Rev. Code* §6111.13 (hereinafter referred to as the "Act") and if the Act is found to be unconstitutional as violative of their rights guaranteed under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, then ordinances of the City of Columbus which effected fluoridation of the City System must also be unconstitutional. Respondents Moody and Jackson, as was ably stated by the District Court, have always asserted that fluoridation of the City System was accomplished not pursuant to the mandate of the Act, but pursuant to Columbus Municipal Ordinances Nos. 1739-71 and 1162-72, passed *vis a vis* the City's powers of local self-government as guaranteed by the Constitution of the State of Ohio.

Thus, the constitutionality of the Act is not relevant or dispositive of the issues before this Court. The only question to be decided is the following:[1]

> Does the Constitution of the United States Prohibit the Council of the City of Columbus From Effecting Fluoridation of the City Water System for the Protection of the Health, Safety and Welfare of the Citizens so Served by the City Water System?

---

[1] Other state issues and the question of constitutional impairment are discussed by Respondent Cashman and are fully discussed by the District Judge in the Opinion and Order from the District Court (App. A of the Petition).

FEDERAL, STATE, AND MUNICIPAL STATUTES AND CONSTITUTIONAL PROVISIONS APPLICABLE

Other than the Ohio Constitutional provisions set forth below, the Petition sets forth all applicable statutes and constitutional provisions. The Ohio Constitution, Article XVIII, Sections 3 and 7, provides as follows:

> "3. Powers. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."
> "7. Local self-government. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

ARGUMENT

1. The Decision To Fluoridate The Columbus Water System Is A Proper Exercise Of The Legislative Function Of The Council Of The City Of Columbus And Is Not Violative Of The State Of Ohio And United States Constitutions.

Fluoridation of the City System is within the Ohio Constitutional powers of Home Rule granted to the City of Columbus pursuant to the Constitution of the State of Ohio (§§3 and 7 of Article XVIII of the Constitution of the State of Ohio) and has a reasonable relation to the public health, morals, safety and welfare of the citizens so served by the City System.

The syllabi in *Kraus v. Cleveland*, 163 Ohio St. 559 (1955), *appeal dismissed for want of a substantial Federal question*, 351 U.S. 935 (1956), read as follows:

"1. Prevention and control of dental caries, a common disease of mankind, is a proper subject, in relation to public health, for legislation enacted pursuant to the police power vested in municipalities by the general laws of the Constitution of the State of Ohio.

"2. The enactment of legislation by the City Council of Cleveland providing for fluoridation of the Cleveland water supply, by the introduction of inorganic fluoride chemicals therein, constitutes neither an infringement of the constitutional liberties of the citizens of such municipality nor an exercise of power in contravention of the general laws in relation to adulteration for the practice of medicine."

The Supreme Court of Ohio, in *Kraus, supra,* held that under the Constitution of the State of Ohio, municipal legislative bodies have the power to determine for their cities whether fluoridation of the municipal water system will take place. Whether fluoridation of a municipal water system takes place pursuant to the Home Rule powers of the municipality or pursuant to *Ohio Revised Code* §6111.13 (which petitioners have properly stated requires fluoridation of city water systems unless a referendum on such question is affirmatively voted) is of no consequence. The only question to be resolved is whether the legislative body of the City of Columbus is prohibited by the United States Constitution to resolve in the affirmative the question of fluoridation of the City System. This Court stated in the case of *Paris Adult Theater v. Slaton,* 41 U.S.L.W. 4935, ___ U.S. ___ (1973) that:

"It is not for us to resolve empirical uncertainties underlying state legislation save in the exceptional

case where the legislation plainly impinges upon rights protected by the constitution itself . . . ."

[41 U.S.L.W. at p.4938.]

"The fact that a Congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find the statute unconstitutional."

[41 U.S.L.W. at p.4939.]

Neither this Court, nor any court, should "sit as a super-legislature to weigh the wisdom of legislation" [*Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)] when such legislation is properly placed before the legislative body and the effects of such legislation do not *plainly* impinge upon specific rights protected by the United States Constitution. As will be discussed *infra*, every court, both state and federal, which has been presented with the issues before this Court, has determined that fluoridation is a proper matter for legislative determination and does not plainly impinge upon any rights guaranteed by the United States Constitution. [See also *Jacobson v. Massachusetts*, 197 U.S. 11 (1904) and *Murphy v. California*, 225 U.S. 623 (1912).]

2. This Court Is Not Presented With A Substantial Federal Question.

The question of whether a municipality may constitutionally fluoridate its water system, either pursuant to its Home Rule powers or pursuant to a directive by the state legislature, has been decided in the affirmative by the Ohio Supreme Court [*Kraus v. City of Cleveland*, *supra*, and *State, ex rel., Lehmann v. Cmich*, 23 Ohio St.2d 11 (1970)]; by the Sixth Circuit Court of Appeals in the case at bar and in *Crawford v. City of Detroit*,

389 F.2d 1001 (C.A. 6th, 1968); and by the highest court in many other states. [*Chapman v. City of Shreveport*, 225 La. 859, 74 So.2d 142 (1956), *appeal dismissed for want of a substantial Federal question*, 348 U.S. 892 (1954); *Readey v. St. Louis County Water Co.*, 352 S.W.2d 622 (Mo. 1961), *appeal dismissed and cert. denied*, 371 U.S. 8 (1962), *reh. denied*, 371 U.S. 906 (1962); *Dowell v. City of Tulsa*, 273 P.2d 859 (Okla. 1954), *cert. denied*, 348 U.S. 912 (1955); *Opinion of Justices*, 243 A.2d 716 (Del. 1968); *Schuringa v. Chicago*, 30 Ill.2d 504, 198 N.E.2d 326 (1966); *Miller v. Evansville*, 219 N.E.2d 900 (Ind. 1966); *Baer v. Bend*, 292 P.2d 134 (Ore. 1956) and *Birnel v. Fircrest*, 335 P.2d 819 Wash. 1959).

This Court has held in the past that there are certain restraints which individuals in our society must be subject to in order to provide for the health, safety and welfare of the citizens within the jurisdiction imposing such restraints. [*Jacobson v. Mass., supra*, pp. 25-26, upholding the Massachusetts compulsory vaccination law.] The controversial nature of fluoridation has been recognized by the many courts which have been presented with, and decided, the constitutional issues presented therein. This Court has in the past refused to accept certiorari in cases in which the issues were identical to those presented by the petition. *(Kraus, supra; Chapman, supra; Readey, supra;* and *Dowell, supra.)* Fluoridation has taken place in hundreds of cities and towns throughout the United States. If this Court were to change its previous opinions with respect to the substantiality of the issues presented herein, and ultimately reverse the Sixth Circuit, great confusion and difficulty (if not impossibility) could result throughout the United States if an effort to reverse the seemingly irreversible fluoridation process was to take place.

CONCLUSION

Petitioners are requesting that this Court issue a Writ of Certiorari to determine the constitutionality of ordinances which effected fluoridation of the Columbus, Ohio, water system. The highest court of the State of Ohio, the Sixth Circuit Court of Appeals, and many State Supreme Courts have unanimously held that a municipality has the constitutional right to fluoridate its water system. There is no conflict in any jurisdiction in regard to this issue. The mere fact that the question of fluoridation is controversial in nature has been recognized by the judiciary, but that alone should not be grounds for this Court to act as a superlegislature and intervene into questions which are reserved to the respective legislative bodies to which the question is presented.

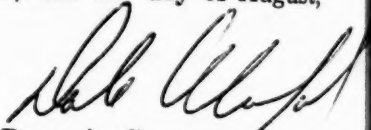
Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dale A. Crawford, hereby certify that three copies of the foregoing Brief of Respondents were delivered to Lyman Brownfield, Attorney for Petitioners, 88 East Broad Street, Columbus, Ohio 43215; and William J. Brown, counsel for Respondent Cashman, State House Annex, Columbus, Ohio 43215, this 13 day of August, 1973.



DALE A. CRAWFORD

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JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

The following questions are presented:

1. Does compulsory fluoridation of a municipal water system violate petitioners' right to privacy as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution?
2. Does a state statute which provides for fluoridation of water supplies serving 5,000 or more persons deny Equal Protection of the laws to those persons residing within a water supply district required to fluoridate?
3. Does a state statute violate the United States Constitution by requiring fluoridation subject to a referendum election thereon in the affected subdivisions, when holding the election provided for is difficult or impossible in some subdivisions?

CONSTITUTIONS, STATUTES AND ORDINANCES APPLICABLE

Petitioners have cited the constitutions, statutes and ordinances applicable to this case, with the exception of the Tenth Amendment to the United States Constitution, which provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

Ohio Revised Code Section 6111.13 became effective on November 17, 1969. Generally, it required public water supply and water-works systems supplying water to twenty thousand or more persons to fluoridate such water supplies on or before January 1, 1971. Water supply systems supplying water to between five and twenty thousand persons were required to fluoridate on or before January 1, 1972.

The water supply system of the City of Columbus was, under Section 6111.13, required to fluoridate by the earlier date, but in fact did not institute fluoridation until January 17, 1973. The fluoridation of the Columbus water supply was done after ordinances providing for fluoridation were passed by the City Council. It has been the contention of respondents Moody and Jackson in this case that their actions were taken pursuant to these ordinances rather than Ohio Revised Code Section 6111.13.

Petitioners filed the instant action on August 4, 1972. In their Complaint they alleged that the enforcement of the state statute and municipal ordinances (contained in the Petition) for the purpose of fluoridation violated their rights to Due Process and Equal Protection as guaranteed by the Fourteenth Amendment to the United States Constitution. Petitioners requested the District Court to convene a three-judge court, pursuant to 28 U.S.C. 2281, for the purpose of: (1) declaring Ohio Revised Code Section 6111.13 unconstitutional; (2) enjoining the Director of the Ohio Department of Health from enforcing Section 6111.13; and (3) enjoining the Mayor and the Director of Public Service of the City of Columbus from enforcing City of Columbus ordinances nos. 1739-71 and 1162-72, which provided for and implemented fluoridation.

District Judge Carl B. Rubin granted respondents' motions to dismiss without convening a three-judge court,

on the ground that the court was without subject matter jurisdiction since no substantial federal question was presented. On April 17, 1973 the Court of Appeals for the Sixth Circuit affirmed the decision of the District Court. The case is now before this Court on Petition for a Writ of Certiorari.

ARGUMENT

A. There is no substantial federal question.

Petitioners' contentions do not merit review by this Court. A long line of decisions, by this and other courts, has very clearly established that fluoridation is a valid exercise of the police power and does not therefore violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Petitioners other claims are even more insubstantial and are predicated upon the particular nature of Ohio Revised Code Section 6111.13. Even if this Court should consider this case on the merits, and should find that Ohio Revised Code Section 6111.13 is unconstitutional, it would still face the question of the legality under federal and Ohio law of the ordinances of the City of Columbus requiring fluoridation.

This Court, moreover, recently dismissed a case raising the same issues raised herein on the ground that it did not present a substantial federal question. *Kraus v. City of Cleveland*, 163 Ohio St. 559, 127 NE2d 609 (1955), Appeal dismissed for want of a substantial federal question, 351 U.S. 935 (1956). And finally, this respondent brings to the attention of the Court the fact that, as of January 17, 1973, fluoride has been introduced into and contained in the water supply the subject of this case.

For the above reasons, and for the reasons expressed in the discussion below, this case is completely inappropriate for review by this Court.

B. There is no conflict of decisions.

Kraus v. City of Cleveland, supra., was preceded and followed by decisions of other courts uniformly holding that fluoridation does not violate Due Process rights. *Chapman v. City of Shreveport*, 225 La. 859, 74 So. 2d 142 (1954), Appeal dismissed for want of a substantial federal question, 348 U.S. 892 (1954); *Dowell v. City of Tulsa*, 273 P.2d 859 (Okl., 1954), Cert. denied 348 U.S. 912 (1955); *Ready v. St. Louis County Water Co.*, 352 S.W.2d 622 (Mo., 1962), Appeal dismissed and Certiorari denied 371 U.S. 8 (1962); *Crawford v. City of Detroit*, 389 F.2d 1001 (C.A. 6, 1968).

There is no decision by any court to this respondent's knowledge that refutes the constitutionality of water fluoridation requirements. As discussed *infra*, the decisions upholding water fluoridation requirements rest upon logic and solid authority under the Due Process and Equal Protection Clauses to the Fourteenth Amendment to the United States Constitution.

C. The decision below is clearly correct.

This Court, in a long line of decisions, has held that the Due Process Clause does not provide ". . . an unlimited right to do with one's body as one pleases . . ." *Roe v. Wade*, 410 U.S. 113, (41 L.W. 4213, 4226) (1973). Thus, in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) and *Buck v. Bell*, 274 U.S. 200 (1927) this Court upheld compulsory smallpox vaccination and the sterilization of incompetents against Due Process attack. And in *Roe v. Wade, supra.*, the Court, citing the above decisions, clearly held that a state had an interest in the health of the individual as well as the community, which it could protect through appropriate legislation. (410 U.S. 113, 41 L.W. 4213, 4225, 4226).

The power of a state to protect and promote the health of its citizens is one reserved by the Tenth Amendment.

It cannot be denied that dental caries are a serious and widespread health problem, which the states or their subdivisions can attempt to correct through appropriate legislation.

Petitioners Equal Protection contentions likewise do not merit consideration by this Court. Even if they did have validity, which they do not, these arguments depend upon peculiarities of the Ohio legislation and do not have such public importance as to require a hearing on the merits.

Ohio Revised Code Section 6111.13 exempts water supplies serving 5000 persons or less from the requirement of water fluoridation. As held by Judge Rubin in this case, the Equal Protection Clause does not prevent the making of classifications, and legislating differently for the groups so classified so long as the classifications are reasonable and "... rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412 (1920); *Reed v. Reed,* 404 U.S. 71 (1971); *Schapiro v. Thompson,* 394 U.S. 618 (1969); *Rinaldi v. Yeager,* 382 U.S. 305 (1966); *Williams v. San Francisco Unified School District,* No. 72-305 (N.D. Calif.), –F. Supp.–(1972).

The distinction in Ohio Revised Code Section 6111.13 between municipalities having populations of 5000 persons or more, and those with less, accords to that of the Ohio Constitution in distinguishing cities and villages. [Article XVIII, Section 1, Ohio Constitution] Municipal corporations of five thousand population or over are cities; smaller municipalities are villages. It is evident that the limitation of mandatory fluoridation to cities has a rational basis. Fluoridation equipment and materials involve a substantial cost. Below a certain population level the fluoridation of water systems becomes inefficient and overly expensive.

These are the type of practical considerations which the legislature can take into account in classifying for the purpose of legislation.

District Judge Rubin recognized the constitutionality of the Ohio legislation under the clearly defined principles of Equal Protection.

> There is no federal constitutional requirement that a state exercise its police powers, to the fullest extent, at any given time, nor that a state law, from the point of view of equal protection necessity, has a uniform application. Because the statutory classification is parallel to the state constitutional provision and does not affect "preferred" constitutional guarantees, we do not think the State need justify the enactment under the heavier burden of "compelling state interest." See *Schapiro v. Thompson, supra.* For these reasons plaintiffs' foregoing contentions under the Equal Protection Clause are without merit. (Appendix, pp. A5, A6)

Petitioners third and final contention is that Ohio Revised Code Section 6111.13 is unconstitutional because it provided for a local referendum election on fluoridation, but by its terms made such an election difficult or impossible to hold in certain areas. If this case had come to hearing, petitioners' contention that the referendum was impossible of implementation would not have been borne out by evidence. Numerous Ohio cities held such a referendum, including Mansfield, Middletown and Springfield.

Putting aside this factual question, however, it is obvious that unless the referendum provision of Section 6111.13 discriminated between distinguishable classes or groups of persons, the mere practical difficulties inherent in holding such an election raises no inference of Constitutional violation. Petitioners do not even contend this. It is thus clear that no Constitutional issue is raised by this contention.

CONCLUSION

From the above discussion it is obvious that the decisions of the District Court and Court of Appeals turned upon well established principles of Due Process and Equal Protection in finding that no substantial federal question was presented. These principles are simply that states can constitutionally enact legislation to protect the health of their citizens, and that such legislation can be rationally tailored to produce the desired result. There is certainly no important or novel federal issue herein presented.

Even if there were important federal questions present in this case, the Court would likely not reach them. If Ohio Revised Code Section 6111.13 should be constitutionally invalid, the Court would still have before it the propriety of the Columbus municipal ordinances mandating fluoridation. This subsidiary question, which was not reached by the District Court or Court of Appeals, involves questions of Ohio law that are inappropriate for consideration by this Court.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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